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# Report of the group of independent experts on accountability*

## Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the group of independent experts on accountability pursuant to Council resolution 31/18.

* The present report was submitted after the deadline in order to reflect the most recent developments.

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# I. Introduction

1. The present report is presented pursuant to Human Rights Council resolution 31/18, in which the Council requested the United Nations High Commissioner for Human Rights to designate two existing independent experts in support of the work of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea to focus on issues of accountability for human rights violations in the country, in particular where such violations amount to crimes against humanity, as found by the commission of inquiry. The High Commissioner designated Sonja Biserko (Serbia) and Sara Hossain (Bangladesh).

# II. Mandate and methodology

## A. Interpretation of the mandate

2. In its resolution the Council requested the group of independent experts, taking into account existing international law and prevailing State practices with regard to accountability: (a) to explore appropriate approaches to seek accountability for human rights violations in the Democratic People's Republic of Korea, in particular where such violations amount to crimes against humanity, as found by the commission of inquiry on human rights in the Democratic People's Republic of Korea; and (b) to recommend practical mechanisms of accountability to secure truth and justice for the victims of possible crimes against humanity in the Democratic People's Republic of Korea, including the International Criminal Court.

3. Given that in the resolution the Council referred to "human rights violations ... found by the commission of inquiry", the group considered that its mandate covered all such violations,[1] notably systematic, widespread and gross human rights violations, including abductions which took place outside the Democratic People's Republic of Korea and led to enforced disappearances continuing in the country. The group did not undertake any fact-finding (including on specific allegations brought to its attention);[2] its meetings focused on approaches and processes of accountability.

## B. Non-cooperation by the Democratic People's Republic of Korea

4. Through communications dated 20 September, 14 October and 6 December 2016 and 17 January 2017, the group of independent experts conveyed to the Government of the Democratic People's Republic of Korea that it was committed to a fully independent and impartial approach, sought meetings with its Permanent Representatives in Geneva and New York, requested permission to visit the country, and solicited the Government's views and any information on the country's accountability processes. The group regrets that the meeting requests were denied, and the other requests remained unanswered. The group remains committed to engaging with the Democratic People's Republic of Korea to discuss the findings of the present report.

[1] A/HRC/25/63 and "Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea".

[2] For example, alleged forced labour of citizens of the Democratic People's Republic of Korea working abroad.

### C. Methods of work

5. In 2016, the group of independent experts undertook missions to Geneva (20-23 September), The Hague (24-26 October), Seoul (21-25 November), Tokyo (28-29 November) and New York (12-14 December). During these missions, the group met with and received information from government officials, officials at international tribunals, including the International Criminal Court, United Nations entities, humanitarian actors, legal practitioners and experts, the National Human Rights Commission of Korea, and national and international civil society groups. In Seoul and Tokyo, the group met victims of human rights violations in the Democratic People's Republic of Korea, civil society groups representing victims, individuals who had lived in the Democratic People's Republic of Korea and others directly affected by the human rights situation there. The group received 16 written submissions, including those from civil society organizations, legal experts and individuals.[1] The group expresses its sincere appreciation to those who shared their views and provided information.

6. The group received advice and support from the Office of the United Nations High Commissioner for Human Rights (OHCHR), including its field-based structure in Seoul, and interacted with special procedure mandate holders. Finally, the group coordinated its work with the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, including through joint meetings in Geneva and Seoul.

## III. Previous recommendations on accountability for human rights violations in the Democratic People's Republic of Korea

7. The commission of inquiry, Special Rapporteurs on the situation of human rights in the Democratic People's Republic of Korea and others have made repeated and strong calls and recommendations for accountability for human rights violations in the country.

8. The commission of inquiry considered issues of institutional and individual criminal accountability.[4] It reflected on the accepted responsibility of the international community to protect the population of every State from crimes against humanity,[5] and deemed that given the commission's findings, it is incumbent on the international community to ensure that the perpetrators are brought to justice.[6] The commission called for the United Nations to ensure that those most responsible for crimes against humanity in the Democratic People's Republic of Korea are held accountable, and for the Security Council to refer the situation to the International Criminal Court or establish an ad hoc international tribunal.[7]

9. Subsequently, the General Assembly decided to submit the report of the commission of inquiry to the Security Council, and encouraged the Council to consider the relevant conclusions and recommendations and take appropriate action to ensure accountability, including considering a referral of the situation in the Democratic People's Republic of Korea to the International Criminal Court.[8] The Council has since held three meetings on

[1] See www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20890&LangID=E; http://ohchr.org/EN/HRBodies/SP/CountriesMandates/KP/Pages/GroupofIndependentExpertonAccountability.aspx.

[4] "Report of the detailed findings", paras. 1167-1194, 1195-1199.

[5] Ibid., para. 1166.

[6] Ibid., para. 1199.

[7] Ibid., paras. 1218, 1225.

[8] See resolutions 69/188, 70/172, 71/202.

the human rights situation in the country, during which several States called for accountability,[9] but has not yet referred the situation to the Court.

10. Accountability for human rights violations has been a consistent focus of the mandate of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea. In his reports, the first Special Rapporteur concluded that "there are a variety of discrepancies and transgressions — several of an egregious nature — in the implementation of human rights in the country, calling for immediate action to prevent further abuses and provide redress" by national authorities as well as the international community.[10] Another former Special Rapporteur equally urged the international community to take bold steps to address crimes against humanity in the Democratic People's Republic of Korea while recalling the duty of the international community to prosecute such crimes.[11] The current Special Rapporteur has emphasized the importance of ensuring accountability for human rights violations, in the interests of justice and as a deterrent for further violations.[12]

# IV. Concept of accountability

## A. International law and practice

11. The Human Rights Council requested the group of independent experts to take into account existing international law and prevailing State practices with regard to accountability. Under international law and practice, accountability for gross human rights violations is not a matter of choice or convenience, but of legal obligation. International norms and standards articulate the requirement for a State to meet this obligation and to ensure an adequate response to allegations of gross human rights violations.

12. States are under a duty to investigate and prosecute human rights violations that amount to crimes under national or international law, in particular genocide, war crimes, crimes against humanity or other gross violations of human rights.[13] Article 2 (3) of the International Covenant on Civil and Political Rights guarantees every victim of a human rights violation the right to remedy. This requires States to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies and, where the investigations reveal violations of certain Covenant rights, bring those responsible to justice. A failure to investigate and bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.[14] The Democratic People's Republic of Korea acceded to the Covenant in 1981 and is legally bound by its provisions. With respect to crimes against humanity, in 1984, the Democratic People's Republic of Korea acceded to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which emphasizes the importance of punishing perpetrators of such crimes.

13. The prohibition of crimes against humanity is a rule of binding international customary law. The duty of States to ensure accountability for such crimes is widely accepted and has been referenced in international treaties, including the Rome Statute of the International Criminal Court, and regularly reiterated in resolutions and other soft law

[9] See, e.g., www.un.org/press/en/2016/sc12615.doc.htm.
[10] E/CN.4/2005/34, para. 67; A/60/306, para. 68; A/62/264, para. 59; A/HRC/7/20, para. 83.
[11] A/HRC/31/70.
[12] A/HRC/34/66, para. 43.
[13] A/HRC/27/56, para. 27.
[14] CCPR/C/21/Rev.1/Add.13, paras. 15, 18.

instruments.[15] Additionally, States have a responsibility to prevent the commission of crimes against humanity. The international community has declared that when States are "manifestly failing" in their responsibility to protect their populations from such crimes, it is prepared to take collective action, in a "timely and decisive manner", and bearing in mind the principles of the Charter of the United Nations and international law.[16]

14. Ensuring accountability for gross human rights violations goes beyond establishing individual criminal responsibility. A comprehensive approach also requires measures towards the realization of the right to know the truth about violations and the right to adequate, effective and prompt reparation, as grounded in international law,[17] and further articulated in the updated set of principles for the protection and promotion of human rights through action to combat impunity[18] and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[19]

15. The occurrence of a human rights violation gives rise to a right to receive reparation for or on behalf of the victim or their beneficiaries, and a duty on the part of the State to make reparation and provide a possibility for the victim to seek redress from the perpetrator.[20] The right to the truth entitles the victims, their relatives and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation, the fate and whereabouts of the victim and, where appropriate, the process by which the alleged violation was officially authorized,[21] as well as the extent and pattern of past violations, and their root causes. It requires States to establish processes that lead to the revelation of the truth about what took place. Such processes contribute to the fight against impunity, the reinstatement of the rule of law and, ultimately, reconciliation.[22] Truth-seeking processes also contribute to the prevention of violations through specific recommendations, including on reparations and reforms. In this regard, education,[23] measures of memorialization, trauma counselling and psychosocial support are crucial.

16. The group notes the critical importance of eschewing one-size-fits-all models,[24] and that diverse mechanisms and measures have been implemented to address gross human rights violations: international tribunals, hybrid courts, domestic courts with or without international support, truth commissions, parliamentary inquiries, civil society-driven processes (including mock trials/tribunals, consultations, memorialization and education initiatives), reparations schemes (including psychosocial support) and vetting programmes, as well as legal and policy measures seeking to guarantee non-recurrence.[25] The management and preservation of existing and future archives has also proven to be of paramount importance.[26]

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[15] For example, General Assembly resolution 67/1.

[16] General Assembly resolution 60/1.

[17] On the right to the truth, see E/CN.4/2006/91, A/HRC/5/7, A/HRC/12/19 and A/HRC/15/33; on reparations, see OHCHR, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*.

[18] E/CN.4/2005/102/Add.1.

[19] General Assembly resolution 60/147.

[20] E/CN.4/2005/102/Add.1, principle 31.

[21] A/HRC/24/42, para. 20.

[22] Ibid.

[23] See www.ictj.org/publication/education-transitional-justice-opportunities-challenges-peacebuilding.

[24] See the reports of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and OHCHR, *Rule-of-Law Tools for Post-Conflict States*.

[25] A/HRC/30/42.

[26] A/HRC/17/21; A/HRC/30/42; OHCHR, *Rule-of-Law Tools for Post-Conflict States: Archives*.

17. The group further recalls that under various sources of international law and United Nations policy,[27] amnesties are impermissible if they prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or other gross violations of human rights; interfere with victims' right to an effective remedy, including reparation; or restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law.

## B. Framework for accountability for human rights violations in the Democratic People's Republic of Korea

18. Given the severity and complexity of the human rights situation in the Democratic People's Republic of Korea, a comprehensive and multi-pronged approach is required to address violations, in line with international norms and standards. Investigation and prosecution of serious crimes are critical. Additionally, the approach must comprise measures to ensure the right of victims to reparations, the right of victims and society to know the truth about violations and guarantees of non-recurrence; it must be tailored to the specificities of the situation in the country.

19. Further, the approach to and measures of accountability must be human rights-based, ensuring that the rights and needs of victims are at the centre of their design and implementation. They must enable acknowledgement of and reparation for injustice, allow for a dialogue that fosters an understanding of the past, and educate individuals on the importance of justice and human rights. These goals can only be achieved through a fully participatory process; accountability measures must reflect the experiences and views of those who lived or live in the Democratic People's Republic of Korea and other victims of human rights violations in the country.

20. Consultations are particularly effective for victims and affected communities to share priorities for achieving accountability and to ensure ownership and effectiveness of mechanisms subsequently established.[28] Currently, the lack of access to the country, as well as restrictions on the rights to liberty of movement, peaceful assembly, and freedom of association and expression within the Democratic People's Republic of Korea present particular challenges to conducting consultations among and with those living there. Nonetheless, awareness-raising, capacity-building and consultation can commence with those who lived in the country and other victims living outside it. The group has sought views on accountability for human rights violations committed in the country from victims and affected communities, including individuals who lived in the Democratic People's Republic of Korea and organizations which represent them, and has sought to give voice to their views in the present report. Considering its limited number of interlocutors within the short duration of its mandate, the group urges that this work continue.

21. The following paragraphs present some of the key issues and challenges identified by the group, to be considered in the design and implementation of any accountability mechanisms.

[27] OHCHR, *Rule-of-Law Tools for Post-Conflict States: Amnesties*.

[28] A/HRC/34/62, A/71/567.

### 1. Unwillingness of the authorities to address the past, and safety concerns

22. The Government of the Democratic People's Republic of Korea categorically rejected the findings of the commission of inquiry,[29] and has not engaged with the group of independent experts. Where there is no demonstrable willingness to address allegations of human rights violations, and where gross violations are purportedly ongoing,[30] efforts to ensure accountability face serious challenges. These include severe limitations on the processes of information or evidence gathering, and consulting with victims, affected communities and civil society within the country, while — critically — ensuring their safety. Several interlocutors expressed deep concerns about the safety and well-being of their relatives and friends in the country, and how this constrained them in pursuing an accountability agenda. In the view of the group, any accountability measures must be premised on a sound assessment and plans for mitigation of the security risks for victims and witnesses.

### 2. Different groups of victims, with different needs and expectations

23. The Secretary-General,[31] the Special Rapporteur on the human rights situation in the Democratic People's Republic of Korea,[32] the commission of inquiry, OHCHR[33] and civil society organizations have reported a wide range of gross human rights violations in the Democratic People's Republic of Korea spanning several decades. The group of independent experts highlights the need to acknowledge that different groups of victims may seek different kinds of redress, and to take into consideration these perspectives in designing appropriate accountability measures while ensuring a non-discriminatory approach.[34]

24. Victims underscored the importance of receiving acknowledgment and recognition of the wrongs done and the suffering caused to them. Several interlocutors expressed fears that their suffering would be forgotten, and emphasized that addressing impunity and providing redress for violations, whether ongoing or past, are and must be continuing concerns for the international community.

### 3. Limited exposure to human rights concepts and practice

25. While the Democratic People's Republic of Korea has ratified a number of core international human rights treaties[35] and guarantees some human rights in its Constitution, people within the country are said to have very limited exposure to human rights concepts as internationally understood. Furthermore, interlocutors noted that there was minimal experience within the country of seeking accountability for human rights violations before effective redress mechanisms.

26. It is not uncommon for accountability demands to be raised in a context where those that have been most affected have a limited understanding of their rights and of their status as rights holders. Such challenges can be overcome by conducting awareness-raising

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[29] See http://webtv.un.org/meetings-events/human-rights-council/regular-sessions/25th-session/watch/id-commission-of-inquiry-on-dprk-31st-meeting-25th-regular-session-of-human-rights-council/3350537719001

[30] A/HRC/34/66.

[31] A/71/439.

[32] See www.ohchr.org/EN/HRBodies/SP/CountriesMandates/KP/Pages/SRDPRKorea.aspx; A/HRC/22/57.

[33] See http://ohchr.org/Documents/Publications/Report_TORN_APART.pdf.

[34] A/HRC/34/62, para 29.

[35] A/HRC/34/66.

initiatives, providing information to and undertaking capacity-building of those concerned, including duty bearers, and by working with representatives of victims' groups.[56] In the context of the Democratic People's Republic of Korea, steps may be initiated despite the lack of opportunity to engage with or among individuals within the country, including with persons who have left the country. In addition, further reflection is needed on how to make information available to people within the country about human rights and redress mechanisms.[57]

### 4. Complexity of accountability in the Democratic People's Republic of Korea

27. Several interlocutors, in particular individuals who have left the Democratic People's Republic of Korea, highlighted the complexity of attributing responsibility for human rights violations in the country given their scale, duration and systemic nature. There may be vast numbers of perpetrators, and distinctions between "perpetrator" and "victim" may not always be clear-cut, given that many may have participated in the broader system of abuse. The group heard of individuals who were compelled to commit crimes to ensure their own survival, and of different motivations and circumstances that might have led to the commission of crimes. Various interlocutors strongly articulated the need for deeper reflection on the concept of responsibility in such a context, and a consequent differentiation or gradation in the assessment of individual culpability. Some noted that the focus should be on ensuring criminal accountability for those who are responsible for the establishment and maintenance of the system of abuse and that some leniency could be shown for others.

28. Crimes under international law are committed by individuals. However, the pursuit of accountability in the Democratic People's Republic of Korea requires a comprehensive analysis of the underlying systems and policies of abuse and the identification both of individuals and institutions directly involved in the commission of heinous acts, and of those who ordered, oversaw, allowed or supported such crimes, in line with internationally accepted modes of liability. Such analysis must ultimately feed into a prosecutorial (and broader accountability) strategy that adequately takes into account the range and scope of violations, types and impacts of victimization, and degrees of liability.[58]

### 5. Broader regional dynamics

29. Several interlocutors indicated that the human rights situation in the Democratic People's Republic of Korea is to some extent rooted in or explained by the history of the Korean peninsula, and that addressing this situation comprehensively requires a full and impartial examination of historic events on the peninsula and in the subregion, including of any allegations of human rights violations.

30. The group's mandate is limited to accountability issues pertaining to violations committed in the Democratic People's Republic of Korea. While historic events and actions of others may provide important contextual information, they cannot be invoked as a justification for any party committing human rights violations or crimes under international law. That said, the group also believes that the path towards long-term peace and stability on the Korean peninsula and the broader region is through a genuine, joint and comprehensive accountability exercise involving all regional actors.[59]

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[56] A/HRC/34/62, para. 72.

[57] Amnesty International, "North Korea: connection denied".

[58] A/HRC/27/56.

[59] The commission of inquiry recommended that the Korean people foster inter-Korean dialogue and that the United Nations and the parties to the Korean War take steps to convene a high-level political

# V. Mapping of options for accountability for human rights violations in the Democratic People's Republic of Korea

31. With a view to making practical recommendations for seeking accountability for human rights violations in the Democratic People's Republic of Korea, the group of independent experts mapped out certain options.

## A. In the Democratic People's Republic of Korea

32. The Democratic People's Republic of Korea is the primary duty holder of the obligation to hold accountable perpetrators of human rights violations committed in the country. As recalled, States must respond to allegations of human rights violations with a prompt, thorough and effective investigation through independent and impartial bodies, and bring those found responsible for such violations to justice. Domestic responses and remedies are generally preferable, considering their proximity to the victims and access to evidence. A review of domestic accountability options is therefore imperative.

33. The commission of inquiry had questioned whether it was a viable option to seek accountability within the country's criminal justice system, as it found that crimes against humanity had been committed pursuant to policies established at the highest level of the State.[40] The commission found that the security and justice apparatus of the country was and remained implicated in human rights violations, including those amounting to crimes against humanity.[41] It highlighted that both the Office of the Prosecutor and the court system had important functions in legitimizing human rights violations, as they were used to prosecute and punish persons for political wrongdoing in a legal process involving fundamentally unfair trials, and therefore also carried institutional responsibility.[42] It determined that, absent profound institutional reforms, the country's institutions were neither willing nor able to effectively investigate and prosecute crimes against humanity.[43]

34. The Human Rights Committee also raised serious concerns regarding the country's justice system and its response to allegations of human rights violations. These related, inter alia, to the constitutional and legislative provisions that endanger the impartiality and independence of the judiciary; the vague and subjective formulation of certain crimes, in particular where they are punishable with the death penalty; the "consistent and substantiated" allegations of ill-treatment and torture by law enforcement personnel; and the compatibility of pretrial detention practices and investigation procedures with the International Covenant on Civil and Political Rights.[44]

35. The group of independent experts acknowledges that in 2016, the Democratic People's Republic of Korea ratified the Convention on the Rights of Persons with Disabilities; submitted its combined second, third and fourth periodic reports to the

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conference to consider a final peaceful settlement. "Report of the detailed findings", paras. 1222; 1225 (j).

[40] Ibid., para. 1160.

[41] Ibid., para. 1167.

[42] Ibid., paras. 1173-1174.

[43] Ibid., para. 1199.

[44] CCPR/C/PRK/CO/72. The commission of inquiry similarly referred to constitutional and legal provisions that violate the principle of legality and severely affect the independence and impartiality of the judiciary (paras. 123-124). See also Korea Institute for National Unification, *2016 White Paper on Human Rights in North Korea*, pp. 142-169.

Committee on the Elimination of Discrimination against Women,[45] and its combined fifth and sixth reports to the Committee on the Rights of the Child.[46] The common core document states that "there is a system of compensation for damage for the citizens whose rights are violated, which are civil compensation and criminal compensation".[47] Further, in the strategic framework for cooperation between the United Nations and the Democratic People's Republic of Korea 2017-2021,[48] the Government and the United Nations agreed that a human rights-based approach will be applied in the formulation and implementation of United Nations programmes and projects. It also provides for United Nations support to the Government in implementing its commitments under a variety of human rights conventions and processes.

36. The group also notes that in 2014, the Democratic People's Republic of Korea accepted recommendations made during the second universal periodic review that are directly related to the issue of accountability. For example, it committed to take all necessary measures to prevent or punish violations of human rights, and ensure the fight against impunity for the perpetrators of crimes, acts of violence and all human rights violations; create a national mechanism for the review of complaints of the population concerning human rights violations; enshrine fully the right to fair trial and due process guarantees; and further strengthen the independence of the judiciary.[49]

37. In 2014, the Government agreed to set up a special investigation committee to conduct comprehensive investigations on all Japanese nationals in the country, including victims of abductions and other missing persons, and committed to the objectivity and transparency of the investigation.[50] Although this committee commenced its work, it appears that no substantial progress or investigative results had been communicated to Japan by early 2016. Following the January 2016 nuclear tests and the February launch by the Democratic People's Republic of Korea using ballistic missile technology, and the adoption of "autonomous measures" by Japan in response[51], the Democratic People's Republic of Korea stated that it would stop the comprehensive investigation and that the committee would be dissolved.[52]

38. In conclusion, despite the commitments described above, the group has no information indicating that viable domestic options for seeking accountability for human rights violations currently exist or have been used in the Democratic People's Republic of Korea. Furthermore, the range of acts criminalized under domestic law appears insufficiently broad to capture the gravity of the allegations contained in the report of the commission of inquiry. For example, while the law in the Democratic People's Republic of Korea treats some of the underlying acts of crimes against humanity as criminal offences, such as murder,[53] deprivation of liberty,[54] rape[55] or abduction,[56] it contains no provisions

[45] CEDAW/C/PRK/2-4.
[46] CRC/C/PRK/5.
[47] HRI/CORE/PRK/2016, para. 52.
[48] See http://kp.one.un.org/content/dam/unct/dprk/docs/DPRK%20UN%20Strategic%20Framework%202017-2021%20-%20FINAL.pdf.
[49] A/HRC/27/10.
[50] A/69/548, para. 40.
[51] See www.mofa.go.jp/a_o/na/kp/page4e_000377.html.
[52] See A/71/439, para. 23; www.mofa.go.jp/mofaj/files/000209107.pdf; http://www.kcna.co.jp/item/2016/201602/news12/20160212-29ee.html.
[53] Penal Code, arts. 266-270.
[54] Ibid, arts. 241; 276.
[55] Ibid, arts. 279-281.
[56] Ibid, arts. 277-278.

capturing the specific context and nature of crimes against humanity (i.e., acts committed in the context of a widespread or systematic attack against any civilian population).

## B. In other domestic systems

90. The group of independent experts examined whether other domestic legal systems provide avenues for redressing human rights violations in the Democratic People's Republic of Korea, in particular crimes against humanity.

### 1. Republic of Korea, Japan and China

91. In considering accountability options for violations in the Democratic People's Republic of Korea, possible avenues within the legal systems of the Republic of Korea, Japan and China merit particular attention, given that nationals of these countries have been victims of human rights violations in the Democratic People's Republic of Korea; that violations may have been (partially) committed on their territories; and/or that they host sizeable groups of people who have lived in the Democratic People's Republic of Korea, including potential victims and perpetrators of and witnesses to human rights violations. The group met with stakeholders in Seoul and Tokyo to seek information about accountability processes in those countries. It regrets that the Permanent Representatives of China in Geneva and New York were not able to meet with it, and that its request for permission to visit China remained unanswered.[87]

*Criminal justice*

92. The criminal laws of all three States include relevant substantive legal provisions. The Republic of Korea ratified the Rome Statute of the International Criminal Court on 13 November 2002 and Japan acceded to it on 17 July 2007, and both countries adopted implementing domestic legislation regulating cooperation with the Court.[88] Whereas the Republic of Korea incorporated the crimes contained in the Rome Statute (genocide, crimes against humanity and war crimes) into domestic criminal law, Japan deemed that its Penal Code already covered them under its common criminal law provisions. China has not ratified the Rome Statute, nor does its Criminal Code cover genocide, crimes against humanity and the full range of war crimes.[89] Whereas all three countries have ratified or acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations treaty bodies have raised concerns with respect to the definition of torture (or the lack thereof) in their domestic laws.[90] Japan is the only one to have ratified the International Convention for the Protection of All Persons from Enforced Disappearance, although the crime of "enforced disappearance" does not appear to be expressly incorporated in its domestic legislation.[91] While common criminal law provisions such as murder, rape or kidnapping could be invoked to prosecute certain human rights violations committed in the Democratic People's Republic of Korea, they may not always adequately cover the extent or specificity of the facts, in particular where these

[87] Letter dated 24 October 2016.

[88] Republic of Korea: Act on the Punishment, etc. of Crimes within the Jurisdiction of the International Criminal Court (Law No. 8719, 21 December 2007); Japan: Act on Cooperation with the International Criminal Court (Act No. 37, 11 May 2007).

[89] China ratified the Convention on the Prevention and Punishment of the Crime of Genocide in 1983 and its Criminal Code includes a number of war crimes (arts. 446, 448).

[90] CAT/C/KOR/CO/2, para. 4; CCPR/C/KOR/CO/4, para. 26; CAT/C/JPN/CO/2, para. 7; CAT/C/CHN/CO/5, para. 7.

[91] See www.ohchr.org/Documents/HRBodies/CED/StatesReports/article29Japan22July2016.pdf.

amounted to crimes against humanity. The group therefore encourages the Republic of Korea, Japan and China to ensure that all crimes under international law are fully incorporated into their domestic laws.

42. All three legal systems allow courts to exercise criminal jurisdiction further to the principles of territoriality and active personality, meaning that crimes committed (in whole or in part) on their territories, as well as crimes committed by their nationals on the territory of the Democratic People's Republic of Korea, could be prosecuted.[62] The Japanese authorities have thus conducted investigations into certain abductions (from Japan) of Japanese citizens involving the Democratic People's Republic of Korea and into other alleged disappearances in which the possibility of such abduction could not be ruled out, and issued some arrest warrants.[63] Interlocutors highlighted the potential implication of the principles of territoriality and active personality in the Republic of Korea given that the country's Constitution and laws provide that the entire Korean peninsula forms part of its territory and that all Koreans are nationals of the Republic of Korea. However, prosecution on this basis alone seems tenuous as the Democratic People's Republic of Korea is recognized as a sovereign State under international law and a State Member of the United Nations, and inter-Korean political agreements state that the two countries acknowledge each other as parties aiming for peaceful unification.[64]

43. All three legal systems also allow prosecution in their courts when the victim of the crime is their national (passive personality),[65] and recognize some form of universal jurisdiction. On the basis of the passive personality principle, Japan could open investigations into crimes against its nationals in the Democratic People's Republic of Korea, but the group is unaware of any such instances. Japanese law also recognizes the principle of universal jurisdiction for a limited range of crimes.[66] Through its International Criminal Court implementation law, the Republic of Korea provided for jurisdiction for Rome Statute crimes committed by a foreign national outside the Republic of Korea where the perpetrator is present in the country.[67] While the Chinese Criminal Code also includes a universal jurisdiction clause with respect to crimes stipulated in international treaties concluded or acceded to by China,[68] crimes against humanity, enforced disappearances and torture do not currently fall into this category.[69]

44. Additional challenges remain with regard to the investigation and prosecution of crimes in these jurisdictions pertaining to human rights violations in the Democratic People's Republic of Korea. The first concerns the compromised access to evidence and suspects. Despite the Japanese authorities having identified a number of suspects in the

[62] Republic of Korea, Criminal Act, arts. 2 and 3; Japan, Penal Code, arts. 1 and 3; China, Criminal Law, arts. 6 and 7.

[63] See http://www.moj.go.jp/files/000044846.pdf. The North Korea Human Rights Act 2006 of Japan requires the authorities to "actively seek out information from the public, as well as to conduct thorough investigations, in order to determine the fate of actual or suspected Japanese abductees". Available from www.hrnk.org/uploads/pdfs/Japan_NKHRA_2006.pdf.

[64] For example, the Agreement on Reconciliation, Non-aggression, and Exchanges and Cooperation Between South and North Korea (The Basic Agreement), 13 December 1991.

[65] Republic of Korea, Criminal Act, art. 6; Japan, Penal Code, art. 3-2 (following a 2003 amendment); China, Criminal Law, art. 8.

[66] Penal Code, arts. 2 (insurrection, counterfeiting, etc.) and 4-2 (crimes governed by a treaty).

[67] For crimes committed prior to entry into force of the law (promulgated on 21 December 2007), jurisdiction would be based on international customary law. Article 5 of the Criminal Act also lists a number of universal jurisdiction crimes.

[68] Criminal Law, art. 9.

[69] Z. Liyang, "The Chinese universal jurisdiction clause: how far can it go?", *Netherlands International Law Review*, vol. 52, No. 1 (2005).

abduction cases, prosecutions cannot be initiated until the suspects are apprehended or extradited, given that Japanese courts do not hold *in absentia* trials.[70] Similar challenges arise in the Republic of Korea. For example, a petition that sought the release of relatives of the petitioners allegedly detained in the Democratic People's Republic of Korea was dismissed on the grounds that the petition had to be filed in the district court of the detainee's locality, that it could not meet the legal requirements with respect to hearing the petitioner, and that any ruling granting the petition could not be enforced.[71]

45. Second, challenges arise given the application of statutes of limitations for some crimes (in particular where they cannot be framed as crimes against humanity). Third, the existence of immunities and a narrower range of modes of liability in domestic law, in particular with respect to command and superior responsibility, may present challenges in bringing cases against higher-level officials. Finally, all three jurisdictions retain the death penalty, which may constitute an obstacle for any future collaboration with United Nations-assisted accountability mechanisms.[72]

*Other accountability mechanisms*

46. In Japan, victims of human rights infringements and other relevant parties may file requests for relief with the Japan Federation of Bar Associations, which can issue a warning, recommendation or request to the infringing institution or organization. Such pronouncements are considered to have a strong influence, and the procedure is not limited by statutes of limitations, as criminal proceedings may be.[73]

47. In the Republic of Korea, the National Human Rights Commission established a centre for human rights violations and a human rights archive to systematically document and maintain records of human rights violations in the Democratic People's Republic of Korea for use in future accountability and reparations processes and for human rights education. While the Commission may receive complaints from individuals who have left the Democratic People's Republic of Korea, it cannot consider them without access to the suspected perpetrator.

48. The new North Korean Human Rights Act of the Republic of Korea established, inter alia, the Centre for Investigation and Documentation on Human Rights in North Korea, to collect, research, preserve, publish or otherwise deal with materials and information pertaining to human rights in the Democratic People's Republic of Korea. These materials must be transferred to the Ministry of Justice every three months, including for possible future legal proceedings. Several civil society organizations, including in the Republic of Korea and Japan, also work with people who have left the Democratic People's Republic of Korea to collect testimonies and undertake valuable research with respect to human rights violations in that country.

49. In anticipation of their use in possible future criminal proceedings or other accountability processes, the group encourages all organizations and institutions that gather information concerning human rights violations in the Democratic People's Republic of

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[70] The group was informed that *in absentia* trials may be problematic owing to article 32 of the Constitution, which guarantees the right of access of persons to courts.

[71] Seoul Central District Court, case No. 2016ŗ6□3, judgment of 24 October 2016.

[72] *United Nations Juridical Yearbook 2007*, part two, chap. VI.A.8(a), paras. 6–7.

[73] See, for example, the petition by 12 individuals, against, inter alia, Japan and the Democratic People's Republic of Korea, to request an investigative committee to examine the causes of human rights violations associated with the repatriation programme for Korean residents in Japan that began in 1959 ("Paradise on Earth") and make recommendations for reparations. The matter remains under consideration. See http://koreasolidl.com/summary2.php?&lang=en.

Korea to coordinate their efforts and ensure that sound methodologies and protocols for the collection of evidentiary materials are in place, that protection concerns of victims and witnesses are fully met and that their consent is adequately sought and recorded.

### 2. In other States

98. Courts in other States may provide avenues to seek accountability for crimes under international law committed in the Democratic People's Republic of Korea,[74] including where the principle of universal jurisdiction is recognized. However, most States require at least the presence of a suspected perpetrator on their territory to activate an investigation or prosecution. Another possible avenue would be through strategic litigation in foreign jurisdictions[75] or in regional courts, for example in relation to human rights abuses committed outside the Democratic People's Republic of Korea by third parties, including business enterprises, if these are attributable to the State[76] and initiated within the country. The group encourages civil society and public interest lawyers to explore such possibilities, in particular where they involve violations committed in the Democratic People's Republic of Korea.

## C. International and internationally assisted courts

### 1. International Criminal Court

99. Strong calls continue to be made for the Security Council to refer the situation in the Democratic People's Republic of Korea to the International Criminal Court,[77] arguing that recourse to an existing institution provides the most expedient approach to achieve accountability for human rights violations committed in the country.

100. Even without such a referral,[78] or the Democratic People's Republic of Korea ratifying the Rome Statute or accepting the Court's jurisdiction, the Court may exercise jurisdiction following referral of a State party[79] or at the initiative of the Prosecutor,[80] including on the basis of communications received from civil society. For example, the Office of the Prosecutor evaluated whether two incidents in 2010 in the Yellow Sea could amount to war crimes under the jurisdiction of the Court. The Prosecutor concluded that the requirements for seeking authorization from the Trial Chamber to initiate an investigation of the situation in the Republic of Korea had in this case not been satisfied.[81]

101. Regardless of how the International Criminal Court acquires jurisdiction of the situation in the Democratic People's Republic of Korea, practical challenges — including resource constraints and the number of cases that can be examined — will imply that many serious crimes will not be tried. Additionally, since the Court has jurisdiction only with

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[74] For example, crimes recorded by the commission of inquiry of abductions and enforced disappearances of nationals, notably, of Lebanon, Malaysia, Romania, Singapore and Thailand (A/HRC/28/71, para. 389).

[75] For example, under the Alien Tort Claims Act in the United States.

[76] Guiding Principles on Business and Human Rights.

[77] For example, by the Working Group on Enforced or Involuntary Disappearances (A/HRC/27/49, para. 72).

[78] For recent initiatives calling for Security Council members to voluntarily refrain from using the veto where crimes against humanity may have been committed, see www.globalr2p.org/our_work/un_security_council_code_of_conduct.

[79] Rome Statute, art. 14.

[80] Ibid., art. 15.

[81] See https://www.icc-cpi.int/NR/rdonlyres/9A9FA4AB-3A4B-4A6E-A6A5-5A7D5A1F4B5C/0/OTP_Publication_Report_ENG-05Jun2014.pdf.

respect to crimes committed after the entry into force of the Rome Statute,[52] on 1 July 2002, it cannot address a considerable number of crimes against humanity described in the commission of inquiry's report that occurred earlier. In this regard, several interlocutors raised a question as to whether the Court could exercise jurisdiction over crimes that had commenced prior to the entry into force of the Rome Statute but were continuing (e.g., with respect to enforced disappearances, considering that the detention or abduction has not been acknowledged, or that the fate of the victim has not been clarified).[53]

54. This legal question is contested but not settled.[54] With respect to the crime against humanity of enforced disappearance specifically, some refer to note 24 of the elements of crime of the Rome Statute[55] to argue that the jurisdiction of the International Criminal Court is limited to cases where the initial arrest, detention or abduction occurred after the entry into force of the Statute.[56] Others highlight that the language in the elements of crime was a careful compromise and that proposed language to explicitly state that the arrest, detention, abduction and refusal all had to occur after the entry into force of the Rome Statute did not find general agreement.[57] The compromise text therefore states that what must occur after the entry into force is the "widespread or systematic attack on any civilian population", i.e., the broader context of the crime against humanity. An argument could therefore be made that the International Criminal Court has jurisdiction in cases where part of the conduct occurred prior to entry into force of the Rome Statute, as long as it forms part of an "attack" on the civilian population that took place, or continued, after its entry into force.[58] The group encourages further examination of this question, including by the Office of the Prosecutor.[59]

### 2. Hybrid or internationally assisted justice mechanisms

55. The commission of inquiry dismissed the option of a hybrid court (involving international and Democratic People's Republic of Korea prosecutors and judges) as in its view consent from the concerned country would be unlikely, and judges of the Democratic People's Republic of Korea would lack the impartiality and independence necessary to

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[52] Rome Statute, art. 11.

[53] See, e.g., Working Group on Enforced or Involuntary Disappearances (A/HRC/16/48, para. 39); Committee on Enforced Disappearances (A/69/56); Human Rights Committee, communication No. 1033/2001, *Singarasa v. Sri Lanka*, views adopted on 21 July 2004, para. 6.3.

[54] W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2016), p. 557.

[55] "This crime falls under the jurisdiction of the Court only if the [widespread or systematic attack directed against a civilian population, of which the conduct forms part] occurs after the entry into force of the Statute."

[56] Schabas, *The International Criminal Court*, p. 342.

[57] G. Witschel and W. Rückert, "Article 7 (1) (i) - Crime against humanity of enforced disappearance of persons", in R.S. Lee, ed., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 102.

[58] A. Nissel, "Continuing crimes in the Rome Statute", *Michigan Journal of International Law*, vol. 25 (2004), p. 670. See also http://lib.kinu.or.kr//wonmun/007/0001477557.pdf. Additionally, the commission of inquiry noted that no such jurisdictional limits apply to the crime against humanity of imprisonment and other severe deprivations of liberty in violation of fundamental rules of international law, which are often also committed in connection with international abductions. On this basis, crimes against humanity related to international abductions could also potentially fall under the jurisdiction of the International Criminal Court ("Report of the detailed findings", note 1673).

[59] Some interlocutors also suggested that certain countries could consider a separate or joint referral to the International Criminal Court regarding abductions that occurred on their territories, arguing that the crimes have continued beyond 2002.

carry out criminal trials that would likely involve senior officials as defendants.[91] The group has not received information indicating that this situation has changed, and deems that any hybrid tribunal involving personnel from the Democratic People's Republic of Korea justice system would first require complete reform of the system.

56. The group notes that the Democratic People's Republic of Korea and the Republic of Korea have adopted official State policies that aim for unification and that reflection is ongoing as to the implications of unification on the two justice systems.[92] The group recommends that a comprehensive accountability agenda be included in those reflections and that international expertise on best practice be sought where needed, including on a possible internationally assisted domestic court in a unification scenario.

57. Hybrid or internationally assisted courts involving domestic justice systems other than that of the Democratic People's Republic of Korea could also be considered. However, this would require addressing potential legitimacy concerns, in particular if its jurisdiction were to include crimes committed entirely in the Democratic People's Republic of Korea. For example, the creation of an international hybrid court involving countries whose nationals have been victims of abductions involving the Democratic People's Republic of Korea may merit further reflection, in particular in the absence of a referral of the situation in the country to the International Criminal Court or the creation of an ad hoc international tribunal.

### 3. Ad hoc international tribunal

58. The commission of inquiry recommended that the Security Council create an ad hoc international tribunal should the situation in the Democratic People's Republic of Korea not be referred to the International Criminal Court,[93] with jurisdiction extending prior to July 2002 to comprehensively address crimes against humanity in the Democratic People's Republic of Korea. It also highlighted the required substantial resource commitments and institutional planning.[94] The Special Rapporteur has also raised the option of an ad hoc international tribunal.[95] Given the limitations and challenges identified above in seeking accountability in domestic systems or through hybrid tribunals involving the Democratic People's Republic of Korea, the group concurs that the creation of an ad hoc international tribunal must be examined.

59. A dedicated international tribunal for the Democratic People's Republic of Korea would allow the temporal, territorial, personal and subject-matter jurisdiction to be calibrated to meet the needs and aspirations of the victims, without the jurisdictional constraints of the International Criminal Court or domestic courts. It could function as a repository of information and evidence, and serve as a catalyst for other justice initiatives at domestic level.[96] If the tribunal were to undertake real outreach[97] to communities across the Democratic People's Republic of Korea, it would enable much-needed awareness-raising

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[91] "Report of the detailed findings", para. 1202.

[92] See https://jpri.scourt.go.kr/filedownload.asp?seq=651, http://lib.kinu.or.kr/wonmun/007.0001477557.pdf.

[93] Alternatively, by the General Assembly relying on "Uniting for peace" resolution 377 (V) and "the combined sovereign powers of all individual Member States to try perpetrators of crimes against humanity on the basis of the principle of universal jurisdiction" ("Report of the detailed findings", para. 1201).

[94] "Report of the detailed findings", para. 1201.

[95] A/70/362, para. 52.

[96] See experiences from the International Criminal Tribunal for the Former Yugoslavia.

[97] See experiences from the Extraordinary Chambers in the Courts of Cambodia.

and education on human rights and justice issues, thereby contributing to the transformation of society in the Democratic People's Republic of Korea into one based on the rule of law.

60. However, the establishment of an ad hoc international tribunal would face several challenges. Firstly, the concerned country may not consent to its creation, or collaborate with it. Proceeding in such circumstances is not unprecedented,[97] but the tribunal's effectiveness in collecting evidence and accessing suspects, and ultimately in bringing cases to trial, may be hampered.[98] The security of victims and witnesses, as well as meaningful outreach and domestic impact, could also be affected.

61. Secondly, international tribunals are costly and lengthy endeavours. The genuine and sustained commitment of the international community from the outset would be critical, including in terms of funding. Thirdly, initiatives will be required to ensure that, given the historical and regional context, the tribunal is perceived as legitimate. This includes ensuring that sources of funding for the tribunal and the selection of judges, prosecutors and staff do not compromise its legitimacy. The same concern applies to identifying an appropriate location for the tribunal, ensuring it is as close as possible to the sources of evidence, including victims and witnesses, while taking into account security concerns.

## D. International human rights mechanisms

62. International human rights mechanisms, including the Human Rights Council and its special procedure mandate holders, the universal periodic review and bodies created under the international human rights treaties to monitor States parties' compliance with their treaty obligations, can contribute to accountability for human rights violations in the Democratic People's Republic of Korea.

63. Forthcoming concluding observations adopted pursuant to the examination of State reports to the treaty bodies mentioned above will include practical advice on steps to implement the rights contained in each particular treaty. Further, mandate holders can intervene directly with the country on allegations of human rights violations that come within the respective mandates by means of letters.[99] The Working Group on Arbitrary Detention has adopted opinions on cases concerning the Democratic People's Republic of Korea,[100] and the Working Group has indicated that there are 110 outstanding cases transmitted to the Government concerning persons allegedly abducted from a number of countries, including in the 1950s.[101]

## E. Sanctions regimes

64. Sanctions regimes have been imposed on the Democratic People's Republic of Korea by the Security Council in response to its nuclear and ballistic missile tests,[102] as well

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[97] See establishment of the International Criminal Tribunal for the Former Yugoslavia or the Security Council referrals of the Sudan (Darfur) and Libya to the International Criminal Court.

[98] Experience with conducting in absentia trials before international tribunals is limited and their effectiveness is debated. See, for example, M. Izrad, "Trials in absentia at the Special Tribunal for Lebanon: an effective measure of expediency or an inconsistency with fair trial standards?", *SOAS Law Journal*, vol. 3, No. 1 (February 2016), p. 38.

[99] See, for example, A/HRC/32/53, A/HRC/26/21, A/HRC/22/67, A/HRC/18/51.

[100] See, for example, A/HRC/WGAD/2015/29, A/HRC/WGAD/2015/32.

[101] A/HRC/33/51, A/HRC/WGEID/110/1.

[102] Most recently in resolution 2321 (2016).

as by the Republic of Korea, Japan, the European Union and the United States, among others. Additionally, the United States has announced specific sanctions targeting individuals and entities it deems responsible for human rights violations in the Democratic People's Republic of Korea.[103]

65. The group recalls the recommendation of the commission of inquiry that the Security Council adopt targeted sanctions against those who appear to be most responsible for crimes against humanity, and that the commission did not support sanctions imposed by the Council or introduced bilaterally that are targeted against the population or the economy as a whole.[104] Subsequently, the General Assembly encouraged the Council to consider the scope for effective targeted sanctions against those who appear to be most responsible for acts that the commission had said might constitute crimes against humanity.[105]

## F. Office of the United Nations High Commissioner for Human Rights

66. OHCHR has an important role to play with regard to taking steps towards ensuring accountability for human rights violations in the Democratic People's Republic of Korea, as an independent and impartial office that can collect, preserve and analyse information, including for the international community.[106] It also supports international human rights mechanisms. In addition, it has established a field-based structure in Seoul pursuant to Human Rights Council resolution 25/25, to conduct monitoring and documentation of the situation of human rights in the country to ensure accountability; to enhance engagement and capacity-building with the Governments of all States concerned, civil society and other stakeholders; and to maintain visibility of the situation of human rights.

## G. Civil society and public interest group initiatives

67. Civil society and public interest groups regionally and internationally play an important role in advocating for accountability measures. They can assist victims in bringing complaints about human rights violations; convene expert meetings to inform discussions about accountability measures, including drawing on similar experiences in the region or internationally; and hold mock trials or people's tribunals to raise public awareness of the scope of allegations.[107] Civil society organizations also have a role in human rights education and awareness-raising on human rights, and providing psychosocial assistance. Such efforts help create conditions conducive to individuals formulating justice demands.

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[103] See https://www.humanrights.gov/dyn/07/treasury-sanctions-north-korean-senior-officials-and-entities-associated-with-human-rights-abuses/, https://www.humanrights.gov/dyn/2017/01/release-of-the-report-on-human-rights-abuses-and-censorship-in-north-korea/, United States North Korean Human Rights Act of 2004.

[104] "Report on the detailed findings", para. 1225.

[105] Resolution 69/188.

[106] For example, *Torn Apart: The Human Rights Dimension of the Involuntary Separation of Korean Families*. The High Commissioner has also briefed the Security Council on the situation of human rights in the Democratic People's Republic of Korea.

[107] See, e.g., http://www.ibanet.org/Crimes-Against-Humanity-in-North-Korean-Political-Prisons.aspx.

# VI. Conclusions and recommendations

68. **International norms and standards require that those responsible for human rights violations in the Democratic People's Republic of Korea, in particular for crimes against humanity, be held accountable. Accountability is a legal requirement. In addition, accountability processes hold the potential to restore the position of victims in society as rights holders and to transform society into one based on the rule of law and respect for the dignity of all, and thereby contribute to long-term peace and stability. Ensuring accountability for such crimes "is an international as much as a Korean challenge and requires the international community to play a role".**[108]

69. **The approach to pursuing accountability for human rights violations in the Democratic People's Republic of Korea must be multi-pronged and comprehensive, and in line with international norms and standards. Investigation and prosecution of serious crimes are indispensable, as are measures to ensure the right of victims and societies to know the truth about violations, the right of victims to reparations, and guarantees of non-recurrence of violations. It will require coordinated efforts in multiple forums, including courts. All accountability measures must be based on solid documentation.**

70. **International human rights law and practice in other States indicate that reflections on accountability should start at an early stage, and that they should place victims at the centre of the design and implementation of accountability measures. It is imperative for any accountability measure to take into account the experiences and views of persons within the Democratic People's Republic of Korea, those who have left the country and other victims of human rights violations committed in the country. Specific attention should be paid to groups identified by the commission of inquiry and others as having been particularly affected, including women.**[109] **Consultations are an effective way to allow victims and affected communities to share their priorities for achieving accountability, and to ensure ownership, legitimacy and effectiveness of the mechanisms that are subsequently established.**

71. **The pursuit of accountability is particularly challenging in the context of the Democratic People's Republic of Korea. The Government denies allegations of human rights violations and refuses to collaborate with the international community in addressing them. The lack of access to the country, restrictions on the rights to freedom of movement and expression of its people, and the security risks for those living in the Democratic People's Republic of Korea must be factored into reflections on accountability measures. The severity, duration, complexity and systemic nature of the alleged violations present unique challenges.**

72. **The group of independent experts has no information indicating that viable options for accountability exist or have been used in the Democratic People's Republic of Korea. A fundamental reform of its justice system would be needed, including changes to legislative and institutional frameworks and safeguards, and a vetting process of law enforcement and justice officials.**

73. **Hybrid models involving the Democratic People's Republic of Korea or its justice personnel cannot currently be envisaged given the lack of impartiality and independence of the judiciary and its alleged implication in the commission of human rights violations.**

[108] A/HRC/31/70 and Corr.1, para. 23.
[109] For example, A/HRC/25/63, paras. 35-36.

74. **While other domestic legal systems, in particular in the Republic of Korea, Japan and China, offer some legal bases for investigations and prosecutions of crimes committed in whole or in part in the Democratic People's Republic of Korea, they face legal, political and practical challenges.**

75. **The International Criminal Court could initiate investigations and prosecutions of some high-level perpetrators, notably upon referral by the Security Council. This avenue must continue to be pursued. The Court is an existing institution created for addressing situations such as the one in the Democratic People's Republic of Korea, where crimes against humanity are alleged to have occurred and where national authorities are unable and/or unwilling to respond adequately. The Court provides an important avenue to hold accountable those most responsible for gross human rights violations that may amount to crimes under the Rome Statute, particularly considering its experience with evidence gathering in challenging environments and its victim and witness protection schemes.**

76. **The crimes described in the report of the commission of inquiry are of a gravity rarely seen, involving systems of abuse that have been operating for decades. These crimes are of international concern and cannot go unpunished. Considering the sheer number of crimes and perpetrators, the prosecution of some high-level perpetrators at the International Criminal Court must be complemented by other criminal accountability processes.**

77. **The group of independent experts believes that the unique context in the Democratic People's Republic of Korea requires the international community to enhance efforts to lay the groundwork for future criminal trials. Regardless of the challenges, the international community should also duly consider the scope for establishment of an ad hoc international tribunal for the Democratic People's Republic of Korea, including as a deterrent for future crimes and a signal that victims will be heard. Preparatory and practical steps are laid out below.**[110]

78. **Within a comprehensive strategy to account for the past, truth-seeking processes serve an important role. While the conditions are not yet in place to consider designing a truth-seeking mechanism in the Democratic People's Republic of Korea itself, including with respect to political will and the possibility for victims to participate in a secure environment,**[111] **reflection and broad consultation on such future processes must commence.**

79. **The group of independent experts recalls the commission of inquiry's recommendations regarding sanctions, and equally cautions against any unilateral measure not in accordance with international law or that impedes the full realization of human rights in the Democratic People's Republic of Korea.**[112]

80. **The group of independent experts identified the following practical steps that can be taken immediately to contribute to a comprehensive approach towards accountability in the Democratic People's Republic of Korea, in line with international standards:**

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[110] Preparatory steps can be taken prior to considering mechanisms such as the International Independent Investigation Commission to assist the Lebanese authorities in their investigations of the killing of Rafiq Hariri (Security Council resolution 1595 (2005)) and the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (General Assembly resolution 71/248 and document A/71/755 on its implementation).

[111] OHCHR, *Rule of Law Tools for Post-Conflict States: Truth Commissions*.

[112] See also the Vienna Declaration and Programme of Action and A/HRC/19/33, para. 41.

(a) **Adopting a human rights-based and comprehensive approach to accountability, placing the rights and needs of victims at the centre of the design and implementation of accountability processes;**

(b) **Raising awareness of victims and affected communities about their rights, notably the right to effective remedy for human rights violations, including through media, communications and education campaigns, enabling them to formulate demands for justice in line with international norms and standards;**

(c) **Undertaking coordinated and comprehensive consultations with victims and other relevant stakeholders, starting with those living outside the Democratic People's Republic of Korea, to seek their views on accountability for human rights violations in the country, while taking measures to ensure the security of participants and minimize the risk of retraumatization;**

(d) **Placing the issue of accountability for human rights violations in the Democratic People's Republic of Korea into broader regional debates on accountability and strengthening of the rule of law, including by providing regional platforms for discussion and development of expertise in addressing past violations, fostering regional awareness and cooperation, as well as opportunities for people-to-people dialogue;**[113]

(e) **Ensuring continued information and evidence gathering, using sound methodologies and protocols that respect international norms and standards, including with regard to victim and witness protection, consent and confidentiality;**

(f) **Preserving and storing information and evidence gathered in a central and independent repository to channel information to appropriate accountability mechanisms;**

(g) **Undertaking an assessment of available information and evidence from a criminal procedure perspective, identifying gaps and developing possible investigation and prosecution strategies and blueprints for suitable international court models;**

(h) **Amending relevant domestic legal frameworks, including by incorporating crimes under international law into domestic legislation and ensuring that criminal procedural and extradition laws are in line with international norms and standards; considering the possibility of universal jurisdiction for such crimes; building the capacity of legal professionals in the investigation, prosecution and adjudication of crimes under international law; and considering abolishing the death penalty;**[114]

(i) **Creating a fund to support future accountability mechanisms, including enabling victims to participate in accountability processes by addressing their safety and well-being concerns.**

81. **The group of independent experts makes the following specific recommendations.**

82. **The Democratic People's Republic of Korea should:**

(a) **Continue to engage with international human rights treaty bodies and cooperate with United Nations human rights mechanisms, including the mandate of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea, notably by granting them access to the country;**

[113] "Report of the detailed findings", para. 1223.

[114] See paragraph 45.

(b) **Implement the recommendations made by United Nations human rights mechanisms, notably the commission of inquiry and the Special Rapporteur, including taking immediate and effective steps to end gross human rights violations and ensuring that allegations of human rights violations are addressed in line with international norms and standards;**

(c) **Reform its criminal justice legislation and rule of law institutions, including its judiciary and law enforcement and corrections systems, in line with international human rights norms and standards and in furtherance of its commitments made during the second cycle of the universal periodic review to fight impunity for human rights violations;**

(d) **Seek technical assistance from the United Nations and other international partners where needed to ensure that human rights are protected, including pursuant to the strategic framework for cooperation between the United Nations and the Government of the Democratic People's Republic of Korea 2017-2021;**

(e) **Create an enabling environment for national dialogue to promote human rights awareness among the population of the Democratic People's Republic of Korea, including by ensuring the rights to liberty of movement, peaceful assembly, freedom of association and expression, including through access to information.**

83. **All stakeholders should:**

(a) **Ensure implementation of previous recommendations on accountability for human rights violations in the Democratic People's Republic of Korea made by the commission of inquiry and international human rights mechanisms, including special procedure mandate holders, notably that accountability for crimes against humanity must be part of any discussion about the future of the Korean peninsula;**

(b) **Specifically, adopt a human rights-based and comprehensive approach to accountability and firmly integrate human rights and accountability into any political process for the Korean peninsula, acknowledging that peace and justice are mutually reinforcing imperatives.**

84. **Member States should:**

(a) **Bearing in mind the responsibility to protect, take further steps towards achieving accountability for those responsible for human rights violations in the Democratic People's Republic of Korea, including through referral by the Security Council of the situation to the International Criminal Court and consideration of the establishment of an ad hoc international tribunal;**

(b) **Enact legislation with extraterritorial effect for gross violations of human rights and, for those States that recognize the principle of universal jurisdiction, consider how they can contribute to securing accountability for human rights violations in the Democratic People's Republic of Korea;**

(c) **Support awareness-raising, documentation and other initiatives undertaken by civil society organizations and others that contribute to accountability for human rights violations in the Democratic People's Republic of Korea;**

(d) **Ensure that the methodology used to document and collect information and evidence on human rights violations in the Democratic People's Republic of Korea meets international norms and standards, including with regard to criminal procedure and issues of consent, confidentiality and victim and witness protection.**

85. **The United Nations should address the serious human rights situation in the Democratic People's Republic of Korea in a coordinated and unified manner, in line with the Secretary-General's Human Rights Up Front initiative, including by promoting the important role of accountability in achieving peace and security.**

86. **The Human Rights Council and the General Assembly should:**

(a) **Sustain their engagement and monitoring of developments in the Democratic People's Republic of Korea with a view to keeping the issue of accountability for human rights violations in the country on the agenda, and take further actions towards accountability at the international level;**

(b) **Strengthen OHCHR through additional resources, including its field-based structure in Seoul, to enable the Office to increase its contribution towards accountability for human rights violations in the Democratic People's Republic of Korea, including by concurrently:**

(i) **Undertaking and supporting sensitization of victims and groups representing victims on international norms and standards pertaining to accountability for human rights violations;**

(ii) **Organizing, in collaboration with relevant stakeholders, coordinated consultations of victims and affected communities, in the first instance in China, Japan and the Republic of Korea and other countries outside the Democratic People's Republic of Korea in which they reside, to seek their views on avenues for accountability;**

(iii) **Strengthening current monitoring and documentation efforts in line with international norms and standards including on consent, and its capacity to receive, preserve and consolidate information and evidence pertaining to the human rights situation in the Democratic People's Republic of Korea through a central and independent repository for use in any future accountability mechanism and to channel relevant information to United Nations human rights mechanisms;**

(iv) **Supporting an assessment by international criminal justice experts of available information and evidence, including on the crime base, command structures and linkages, to identify gaps and develop possible investigation and prosecution strategies as well as blueprints for suitable international or internationally assisted court models.**

87. **The Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea should:**

(a) **Integrate the findings of the present report into his efforts regarding human rights protection in the country;**

(b) **Cooperate with other mandate holders to ensure that accountability processes duly reflect the needs of groups at risk of marginalization, including persons in detention, victims of enforced disappearances and their families and victims of gender-based violence.**

88. **Civil society organizations should:**

(a) **Continue raising awareness, specifically through regional initiatives and professional networks, reporting on human rights violations committed in the Democratic People's Republic of Korea and supporting victims in formulating justice demands before relevant mechanisms;**

(b) **Consider innovative initiatives by regional networks, such as mock trials and tribunals led by civil society on specific issues or groups of victims, including women or disappeared persons, to enable discussions on reported violations in the Democratic People's Republic of Korea and means of seeking accountability.**